

JOE SHIELDS

VS.

KENNITH DALE HENSLEY AND
RICHARD DEAN JONES, INDIVIDUALLY
AND D/B/A ALL STAR COMMUNICATIONS
OF TEXAS; JIMMY RAY LETULLE,
KENNITH DALE HENSLEY, AND
RICHARD DEAN JONES, INDIVIDUALLY
AND D/B/A ALL STAR COMMUNICATIONS;
TEXAS TELEMARKETING, INC.;
VERONICA LEE GARAY AND JOE ANTHONY
FERNANDEZ, INDIVIDUALLY AND D/B/A
DIGITECH DSS; DISH TV, INC.; ALL
AMERICAN ALARMS, INC.;
SOUTHWEST DISH, INC.; NEW AGE
SATELLITE AND SECURITY COMPANY;
RICHARD ORTIZ and MICHAEL PATRICK
SULLIVAN, INDIVIDUALLY AND D/B/A
NBE MARKETING and D/B/A TRI-STAR
MARKETING NETWORK; STAR-SAT OF
HOUSTON, INC.; DIRECTV, INC.,
AND ECHOSTAR TECHNOLOGIES
CORPORATION D/B/A ECHOSTAR

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

280th JUDICIAL DISTRICT

FILED
CHARLES BACARISSE
DISTRICT CLERK
HARRIS COUNTY, TEXAS
02 FEB 11 PM 4:59

**PLAINTIFF'S RESPONSE TO THE MOTIONS FOR SUMMARY JUDGMENT
FILED BY ECHOSTAR SATELLITE CORPORATION AND DIRECTV, INC.**

1. In this single document, Shields will respond to the motions for summary judgment filed by both DirecTV, Inc. (hereinafter called DirecTV) and EchoStar Satellite Corporation (hereinafter called EchoStar).

THE MOVANTS' BURDEN OF PROOF

2. In a summary judgment proceeding, "[i]t is well established that a defendant moving for a summary judgment assumes the burden of showing as a matter of law that the plaintiff had no cause of action against him." *Citizens First National Bank v. Cinco Exploration*, 540 S.W.2d 292, 294 (Tex. 1976). Further, a defendant movant must establish that as a matter of law there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action. *Id.*

3. Further, to the extent that the defendant moves for summary judgment on an affirmative defense, the law is well established that the defendant must expressly present and conclusively prove each essential element of the affirmative defense. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972); *Havlen v. McDougall*, 22 S.W.3d 343, 345 (Tex. 2000).

STATEMENT OF FACTS

3. Joe Shields has alleged that, since October, 1999, he received some twenty-seven (27) telemarketing calls, most of them using an artificial or prerecorded voice, advertising or soliciting his purchase of goods and services sold or provided by DirecTV and EchoStar. Some of the calls, he alleges, were for just one or the other of the two entities, although a few were for both. Shields has alleged that the telephone calls made and the telemarketers making the calls violated various provisions of the Telephone Consumer Protection Act (47 U.S.C. §227) and the Texas Business and Commerce Code (TEX. BUS. & COMM. CODE §38.47(f) [until January, 2002, this sub-section was numbered (g)]). Lastly, Shields has alleged that DirecTV and EchoStar themselves violated the TCPA because they failed to put him on a company wide Do Not Call list.

4. While Shields has never alleged that either DirecTV or EchoStar made any of the calls of which he now complains themselves, he has alleged that these calls were made on behalf of or for the benefit of those entities. Neither DirecTV nor EchoStar has even suggested to the contrary. Rather, their position is that they cannot be liable for such calls since they did not make them. Thus, Shields believes that, for purposes of the motions for summary judgment, this Court should presume that Shields received the calls and that in some regard or another each call violated the TCPA, the regulations promulgated by the Federal Communications Commission (hereinafter FCC) pursuant to the TCPA, the FCC orders involving the TCPA, or the cases interpreting the statute and regulations.

5. In addition, Shields has pled that he has requested from the entities and individuals making the calls and from both DirecTV and EchoStar that he receive no further telemarketing calls.

6. Lastly, while it is true that for several years now (since before the telemarketing calls alleged in this suit began), Shields has been a customer of DirecTV, he has alleged that he requested that he be placed on Do Not Call lists for DirecTV and those calling in its behalf.

**DIRECTV AND ECHOSTAR ARE LIABLE FOR CALLS MADE TO SHIELDS
IN VIOLATION OF THE TELEPHONE CONSUMER PROTECTION ACT**

7. Both DirecTV and EchoStar have sought summary judgment on the ground that since they did not make the calls themselves, they are not liable to the plaintiff for the statutory damages, additional damages as may be found by the Court, and attorney's fees, nor may they be enjoined from violating the TCPA. While their arguments ignore the alleged violations of the company wide Do Not Call requirements, there is ample authority to the effect that DirecTV and EchoStar are liable to Shields for such damages and may themselves be enjoined by the Court from violating the TCPA.

8. Statutes, FCC Regulations, FCC Orders, and cases all hold that the entity on whose behalf or for whose benefit calls were made is liable for violations of the TCPA. 47 U.S.C. §206 ("In case any common carrier [such as DirecTV and EchoStar -- see 47 U.S.C. §153(10); in addition, in its motion for summary judgment, EchoStar admits that it is a common carrier. See EchoStar Satellite Corporation's Motion For Summary Judgment, page 43] shall do, or cause or permit to be done, any act, matter, or thing in this chapter [the chapter to which Section 206 refers includes Section 227, the TCPA] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, ..."); 47 C.F.R. §64.1200(e)(2)(iii) (if a do-not-call request is recorded or maintained by a party other than the entity on whose behalf the

solicitation is made, the entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request); 10 FCC Rec'd 12391, 12397 (1995) at paragraph 13 ("Our rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations."); 47 U.S.C. §217 ("In ... enforcing the provisions of this chapter, the act, omission, or failure of any ... other person acting for ... any common carrier or user, acting with the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."); *In the Matter of Long Distance Direct, Inc.*, FCC 00-46 (FCC 2000) ([common] carriers are responsible for the conduct of third parties acting on the carrier's behalf, including third party marketers. To hold that the statute does not include independent contractors would create a gaping loophole in the statutory requirements and frustrate legislative intent); *MCI Telecommunication Corp.*, 11 FCC Rec'd 1821 (1996) ([common] carriers are responsible for the conduct of third parties acting on the carrier's behalf, including third party marketers); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rec'd 12391 ¶¶ 33-34 (August 7, 1995) ("We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA] ...") (most interestingly, this is a citation used by EchoStar to support its claim that it has no liability to the plaintiff).

9. The authorities on which defendants rely are readily distinguishable. They cover a situation not found in the case at bar. The situation to which they refer is when a caller uses a telephone line or communications system of a common carrier, the common carrier is not liable. That is not the situation present in the instant suit. Shields has not sued his telephone company or the telephone company providing service to any of the telemarketers. Rather, Shields has sued the entities (DirecTV and EchoStar) on whose behalf the calls were made.

10. In addition, the authorities upon which defendants rely are distinguishable on another ground. The offers of the various telemarketers calling on behalf of one of the moving defendants are always the same as the offers made on that defendants' web-site. See Shields

affidavit attached hereto. See, also, the contract between DirecTV and All American Alarms, Inc., a defendant herein, attached hereto. (Shields is only attaching one of the several contracts of the telemarketers of DirecTV. EchoStar has not yet responded to the request for production for such documents. The DirecTV contracts are all the same (except for the name of the telemarketer) and Shields sees no advantage by attaching a large number of such contracts.) These contracts show that the telemarketer may advertise only certain products, must quote the prices provided to it by DirecTV, and must follow DirecTV's guidelines and directions.

11. As defendants point out in their motions for summary judgment, a common carrier is liable under the TCPA if they are the "originator or controller of the content of the call or message." S. Rep. No. 178, 102d Cong., 1st Sess. 9 (1991) (cited by EchoStar in its Motion for Summary Judgment on pages 43 and 44). As also noted by defendants, a common carrier is liable for TCPA violations if it has a high degree of involvement in the content of the message sent. See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rec'd 8752 ¶54 (F.C.C. October 16, 1992) (cited by EchoStar in its Motion for Summary Judgment on page 44).

12. Although Shields believes that, as a matter of law defendants' arguments fail, at the very least they present fact questions -- were the defendants the originator or controller of the message?; and did the defendants have high degree of involvement in the message being transmitted by the telemarketers themselves?; and are the telemarketers independent contractors?

13. Lastly, this Court may fairly ask whether the telemarketing calls were made on behalf of or for the benefit of the movant defendants. It is without question that the monies sent by the purchasing consumers are not sent to the individual telemarketers, nor do those telemarketers send a monthly bill to the consumers. All of the money that transfers hands is paid to the moving defendants and some of that money is rebated or paid to the various telemarketers. At the very least, the moving defendants have not met their summary judgment proof that the

calls were not made on their behalf or for their benefit. See the contract between DirecTV and All American Alarms, Inc., a defendant herein, attached hereto.

INTRASTATE TELEPHONE CALLS THAT VIOLATE THE TCPA RESULT IN PENALTIES

14. Both DirecTV and EchoStar suggest to this Court that since all of the telemarketing calls were intrastate, the TCPA has no effect on them. Again, there is ample law to the contrary.

15. Defendants rely on two district court decisions to support their arguments, *Chair King, Inc. Houston Cellular Corp.*, No. H-95-1066, slip op. (S.D. Tex. 1995) *vacated* 131 F.2d 507 (5th Cir. 1997) and *Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101 (S.D. Ga. 1996) *vacated* 136 F.3d 1287 (11th Cir. 1998) *modified* 140 F.3d 898 (11th Cir. 1998). The reason that those decisions were vacated was because federal courts have no jurisdiction over cases filed by individuals under the TCPA. See 47 U.S.C. §227(b)(3) and (c)(5); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516, 519-20 (3rd Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432, 435 (2nd Cir. 1998); *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1151 (4th Cir. 1997); *Murphey v. Lanier*, 997 F.Supp. 1348, 1351-52 (S.D. Calif. 1998) *aff'd* 204 F.3d 911 (9th Cir. 2000).

16. The *Chair King* district court held that the TCPA did not apply to intrastate calls because the TCPA statute “does not state otherwise.” *Chair King v. Houston Cellular Corp.*, No. H-95-1066, slip op. at 2 (S.D. Tex. 1995) *vacated*, 131 F.3d 507 (5th Cir. 1997). This reasoning fails for two reasons: first a conforming amendment to the TCPA (see paragraph 19 below) demonstrates the clear intention of Congress that the TCPA would apply to intrastate as well as interstate calls; and second, the Communications Act of 1934, as amended, has been found to apply generally to intrastate communications even though Congress did not explicitly mention intrastate communications. *Benanti v. United States*, 355 U.S. 96, 99 (1957) (holding that 47

U.S.C. 605 (proscribed unauthorized interception of communications applies to both interstate and intrastate communications).

17. Other provisions of the Communications Act of 1934 have been held to apply to both interstate and intrastate communications even though intrastate communications are not explicitly mentioned. For example, 47 U.S.C. §223(a)(B)(ii), (b)(2), and (d)(1) provide restrictions on interstate commercial delivery of indecent material to certain persons, but has been held to apply with equal force to intrastate delivery of the same materials. Regulations Concerning Indecent Communications by Telephone, *Notice of Proposed Rule Making*, 5 FCC Rec'd 1011, ¶9 (1990). Similarly, 47 U.S.C. §225(a)(1) dealing with telecommunications services for handicapped persons has been held to apply with equal force to interstate and intrastate telecommunications.

18. A federal district court in Texas has specifically held that the TCPA applies to intrastate telecommunications. *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1087-1089 (W.D. Tex. 2000). In reaching this decision, the Texas court agrees with the only other court decision on this point. *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga.App. 363, 537 S.E.2d 468, 471-72 (Ga.App. 2000).

19. While it is generally true that much of the 1934 Act as written applies solely to interstate and foreign communications (47 U.S.C. §152; *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986)), when the Congress passed the TCPA it specifically exempted the TCPA from interstate and foreign limitations. 47 U.S.C. §152(b). The inclusion of Section 227, the TCPA, within the exceptions to the rule restricting the FCC's ambit of control to interstate and foreign telecommunications is reflected by the manifest and implacable determination by Congress that interstate telemarketing misconduct is within the ambit of the statute.

20. That Congress intended the TCPA to be equally applicable to interstate and intrastate telecommunications may also be found in the legislative history. Congress Markey, the house sponsor of what became the TCPA stated:

The legislation, which covers both intrastate and interstate unsolicited calls, will establish federal guidelines that will fill the regulatory gap due to differences in federal and state telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between federal and state statutes.

CONG. REC. E 793 (March 6, 1991)

21. Absent of any contrary statement in the legislative history, there is thus a strong suggestion that Congress intended the TCPA to apply to intrastate telemarketing calls.

22. Lastly, the United States Supreme Court has repeatedly held that the interpretation of a statute by the administrative agency charged with administering that statute is entitled to great deference by the courts. *Smith v. Robinson*, 468 U.S. 992, 1027 (1984); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). A construing court needs only to be satisfied that the agency's interpretation is a permissible one under the statute, even if the agency's interpretation is not the one the construing court would favor absent the administrative view. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 at n. 11 (1984)

23. In its first interpretation directly addressing the application of the TCPA to intrastate calls, the FCC answered the question whether the TCPA applied to intrastate calls, stating:

Yes. FCC rules apply to in-state calls.

In addition, states may apply their own regulations to in-state calls for the following types of calls if those regulations are more restrictive than FCC rules: ... and (3) the making of telephone solicitations.

Consumer Alert, 8 FCC Rec'd 480 (1993)

24. The FCC has consistently held to this position. In *Petition of the People of the State of California and the Public Utility Comm'n of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, Order on Reconsideration*, 11 FCC Rec'd 796, 810 n. 56 (1995), the FCC stated that "section 227 [the TCPA] gives the FCC jurisdiction over intrastate telephone solicitations despite the lack of any specific reference to intrastate communications."

25. The defendants are not entitled to summary judgment on the basis that the calls made to Shields were intrastate calls.

THE TELEPHONE SOLICITATIONS DID NOT COMPLY WITH TEXAS LAW

26. Both DirecTV and EchoStar contend that they are entitled to summary judgment because the telephone calls made to Shields complied with Texas law which (they allege) trumps federal law.

27. Texas adopted the TCPA and the FCC regulations passed pursuant thereto during the 1999 legislative session. The Texas statute, found at TEX. BUS. & COMM. CODE §35.47(f) (this section was numbered as (g) until January 1, 2002) states:

A person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by this subsection, or both. [The balance of the Section deals with the amount of damages recoverable by a successful plaintiff.]

28. There is simply no basis to argue that somehow a violation of the TCPA is not also a violation of Section 35.47(f) of the Texas Business and Commerce Code.

29. Further, the same arguments now made by defendants were made and disposed of adversely to the defendants in this case in *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1089 (W.D. Tex. 2000). As noted in that case, simply because you comply with one law does not preclude you from violating another law. As further noted in that case, the argument made by the defendants

turns the Supremacy Clause of the federal constitution on its head. While the TCPA does provide that more restrictive state laws are not preempted by the TCPA, *see* 47 U.S.C. §227(e), it does not follow that, should a state pass more restrictive laws regarding [telemarketing calls], the TCPA is then preempted in that state. The TCPA contains no “reverse preemption” clause for its ban on unsolicited [telemarketing calls].

30. Defendants argue that somehow the portion of Texas law which it believes regulates telemarketing calls is more restrictive than the TCPA. Defendants note that Texas law merely prohibits telemarketing calls made to mobile telephones and telemarketing calls made without

the consent of the called party if the called party will be charged for the call. Clearly those statutory provisions are not more restrictive than the TCPA and the TCPA must control.

31. Thus, defendants are not entitled to summary judgment on that ground.

THE MANDATORY \$500 AWARD IS NOT UNCONSTITUTIONAL

32. In their last “joint” ground for summary judgment, EchoStar and DirecTV contend that the statutory \$500 minimum amount for each violation of the statute and regulations is unconstitutional under both the Texas and United States Constitutions.

33. Shields is aware of several cases which have discussed the constitutionality of the damage provisions set forth in the TCPA. In each of those cases, the \$500 statutory amount was held to be constitutional. The Texas case on point is *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1090-91 (W.D. Tex. 2000) in which the court pointed out that a statutory penalty violates the constitution “only where the penalty is so severe and oppressive as to be wholly disproportional to the offense and obviously unreasonable.” The Texas court found support for its position in *St Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919) and in *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1167 (S.D. Ind. 1997), a TCPA case.

34. As noted in *Blastfax*, the statutory penalty is designed to serve two purposes, to compensate for the private injury that the consumer sustained and to deter the overall public harm caused by the telemarketers wrongful conduct.

35. The United States Supreme Court in *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919) , a case involving a statutory penalty for passenger overcharges, held

When [the statute] is considered with due regard for the interests of the public, the numberless opportunities for committing the offence, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously objectionable.

36. See, also, *Foreman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995), a TCPA case in which the court noted that the \$500 minimum award for each violation of the statute and regulations is “designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf.

37. EchoStar and DirecTV are not entitled to summary judgment on this point either.

**AN ENTITY WITH WHOM A CONSUMER HAS AN ESTABLISHED
BUSINESS RELATIONSHIP MAY BE LIABLE UNDER THE TCPA**

38. DirecTV has alleged that its agents are not prohibited from making the telemarketing calls to Shields because it (DirecTV, not the agents) has an established business relationship with Shields. It relies upon 47 U.S.C. §227(a)(3)(B) and C.F.R. 64.1200(f)(3, 4).

39. An inconsistency in DirecTV’s arguments may be fairly noted here. DirecTV has claimed that it is not liable for any of the calls made to Shields because it, DirecTV, did not make them -- that they were made by its “retailers” or “independent contractors.” However, solely in its own behalf it seeks an exemption for these calls because it has an established business relationship with Shields.

40. While it is true that Shields has an established business relationship with DirecTV, that does not allow DirecTV (or others on its behalf) to make the prerecorded calls alleged in this case. As the FCC noted in its Report and Order, 7 FCC Rec’d 8752 (1992) ¶34 at note 63:

We emphasize, however, that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company’s do-not-call list. A customer’s request to be placed on the company’s do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation. See n. 47, supra. (underlining in original)

41. In its Report and Order, 7 FCC Rec’d 8752 (1992) ¶24 at note 47, the FCC stated:

The definition of “telephone solicitation” in §227(a)(3) also excludes calls made to parties with whom the caller has an established business relationship and calls for which the calling party has received the called party’s prior express invitation or permission. We emphasize, however, that subscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, thus subjecting that telemarketer to the requirements of §64.1200(e) [of the Code of Federal Regulations]. (underlining in original)

42. In addition, the FCC answered the question “What is an ‘Established Business Relationship?’” at 8 FCC Rec’d 480 (1993):

You have an “established business relationship” with a person or business if you have made an inquiry, application, purchase or transaction regarding its products or services. You may end an “established business relationship” by telling the person or entity that you do not want to receive any more calls or solicitations from them.

43. It is without dispute (and is further shown by the summary judgment evidence attached hereto) that Shields tried repeatedly to stop the calls DirecTV’s “independent contractors” made to him. He wrote to the various DirecTV “independent contractors” and to DirecTV itself, telling them all to stop calling him and to put him on their do not call list. His efforts did no good.

44. There is nothing in the statute, the Regulations, or the various FCC orders that would indicate that Shields must cease all business with DirecTV to stop getting the calls. He may continue to use their products and services and still not be required to receive further telemarketing calls trying to sell him what he already has.

45. What could the purpose behind such calls be? The purpose of the “established business relationship” exception to the TCPA is to allow an entity with which a consumer has a prior business relationship to learn about new products and services and so that the business may contact the customer about delinquent accounts. There is no summary judgment evidence that the purpose of the calls made to Shields by DirecTV’s telemarketers was to tell Shields about some new product or service, nor is there any summary judgment evidence that the calls made to Shields by DirecTV’s telemarketers was to attempt to collect a delinquent bill. To the contrary, the summary judgment evidence is conclusively that the calls were attempts by DirecTV’s telemarketers to persuade Shields to sign up for DirecTV’s service, a service Shields already had. The “independent contractors” were trying to sell Shields the DirecTV system. They were not advising him of new products or services. They wanted him to sign up when he already was signed up for DirecTV.

46. DirecTV is thus not entitled to a summary judgment on this ground.

**AN ENTITY THAT HAS ESTABLISHED REASONABLE PROCEDURES
TO PREVENT TELEPHONE SOLICITATIONS IN VIOLATION OF THE TCPA
MAY BE LIABLE FOR VIOLATIONS OF THE TCPA**

47. DirecTV has also sought summary judgment on the ground that it has established reasonable procedures to prevent telephone solicitations in violations of the TCPA. It relies upon the language of 47 U.S.C. §227(c)(5).

48. This sub-section of the TCPA is an affirmative defense and thus DirecTV bears the burden of proving that it has adopted such procedures as a matter of law. However, attached hereto are two affidavits of Kristen Haley which may well rebut the adoption of reasonable procedures by DirecTV. The two affidavits are contradictory in various relevant parts which, at the very least, raises a question of fact for the fact finder.

49. In the first of the affidavits, dated April 28, 2000, Ms. Haley, an employee of DirecTV, states that since June 22, 1999, anyone making a sales solicitation for or on behalf of DirecTV sees a computer screen which notifies the caller that Shields should not be solicited by telephone. The conclusions of this affidavit are supported by the promises made to Shields by DirecTV's general counsel as evidenced by his letter to Shields promising that no one, including telemarketers, will contact Shields to advertise DirecTV's products or services. See attachments to Shields' affidavit.

50. But in the second affidavit, dated July 17, 2000, the same Ms. Haley states that the telemarketing callers would not have seen the computer screen because DirecTV does not share its do not call list with anyone, including those "independent contractors" who solicit for or on behalf of DirecTV.

51. Thus, DirecTV, if the fact finder determines that Ms. Haley's second affidavit is correct, admits that Shields' telephone numbers are not placed on any company wide do not call list and that DirecTV has violated the TCPA.

52. In addition, this affirmative defense is applicable only to suits brought under 47 U.S.C. §227(c) which prohibits the receipt of more than one telephone solicitation within a twelve(12) month period on behalf of the same entity. This defense has no applicability to a cause of action brought under 47 U.S.C. §227(b) which prohibits calls that violate the statute or the regulations of the FCC. Compare 47 U.S.C. §227(b)(3) with 47 U.S.C. §227(c)(5).

53. This lawsuit is brought under Sub-section (b) of the TCPA and thus the defense raised by DirecTV is not applicable at all. Summary judgment in favor of DirecTV on this ground should be denied.

54. But further, the summary judgment evidence before this Court show that plaintiff and governmental agencies in his behalf have previously corresponded with DirecTV and its telemarketers and that Shields has been assured by DirecTV that he would be placed on the do-not-call list for DirecTV and its telemarketers. Thus, the established business relationship between Shields and DirecTV had been severed as a matter of law and DirecTV and its telemarketers were not authorized to place telemarketing calls to Shields because of any prior business relationship.

55. In addition, the summary judgment evidence conclusively shows that Shields received telemarketing calls on behalf of DirecTV after DirecTV contends that it placed Shields' name on the do-not-call list. At the very least, then, there is a question of material fact whether the procedures established by DirecTV were reasonable.

56. DirecTV is thus not entitled to summary judgment on this ground.

**THIS COURT SHOULD NOT GRANT DIRECTV'S REQUEST FOR
DECLARATORY JUDGMENT RELIEF OR ATTORNEY'S FEES**

57. DirecTV by way of counter-claim (and now on summary judgment) seeks a declaratory judgment that it did not violate the TCPA and that it is not liable for the statutory damages and additional damages for which those who called on its behalf or for its benefit are liable. DirecTV also seeks attorney's fees under the Declaratory Judgment Act from this Court.

The question of the validity of DirecTV's counter-claim for a declaratory judgment and for attorney's fees has previously been presented to this Court. On September 25, 2001, Shields filed his special exceptions to DirecTV's counter-claim by which it seeks the declaratory judgment and attorney's fees.

58. In his special exceptions, Shields noted that a counterclaim, cross-claim or third-party claim for declaratory relief merely seeking to pave the way for an award of attorney's fees is generally improper. In support of his special exceptions, Shields referred the Court to *John Chezik Buick Co. v. Friendly Chevrolet Co.*, 749 S.W.2d 591, 594-95 (Tex.App. -- Dallas 1988, writ denied) (the Declaratory Judgment Act is not available to settle disputes already pending before a court; a counterclaim under the Declaratory Judgment Act presenting no new controversies but brought solely to pave the way to attorney fees is not proper); *Redwine v. AAA Life Ins. Co.*, 852 S.W.2d 10, 17 (Tex.App. -- Dallas 1993, no writ) (the Declaratory Judgment Act is not available to settle disputes already pending before a court; a counterclaim brought under the Declaratory Judgment Act presenting no new controversies but brought solely to pave an avenue to attorney fees is improper); *Fowler v. Resolution Trust Corp.*, 855 S.W.2d 31, 37 (Tex.App. -- El Paso 1993, no writ) (when a party seeks a declaratory judgment by way of a counterclaim, that party must show that the counterclaim is not seeking resolution of disputes already pending before the court; otherwise the counterclaim is improper); *Lyco Acquisition 1984 Ltd. Partnership v. First National Bank of Amarillo*, 860 S.W.2d 117, 120 (Tex.App. -- Amarillo 1993, writ denied) (where the counterclaim for declaratory judgment requested the court to declare that the defendant had no liability to the plaintiff upon the claims asserted by the plaintiff, the counterclaim was improper).

59. Shields pointed out to the Court that a counterclaim for a declaratory judgment is appropriate only if the counterclaim amounts to more than a mere denial of the plaintiff's claim. The counterclaim must have greater ramifications than the original suit. In that connection, Shields cited *Howell v. Mauzy*, 899 S.W.2d 690, 706 (Tex.App. -- Austin 1994, writ denied) (the

declaratory judgment act is not available to settle disputes already pending before the court; a counterclaim which merely seeks an affirmative defense to the original suit is improper; the valid declaratory judgment counterclaim must be something more than a mere denial of the plaintiff's claim); *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638-39 (Tex.App. -- Austin 1992, writ denied) (a counterclaim under the Declaratory Judgment Act is proper only if the counterclaim is more than a mere denial of the plaintiff's cause of action; it must have greater ramifications than the original suit and should seek some sort of affirmative relief); *Fowler v. Resolution Trust Corp.*, 855 S.W.2d 31, 37 (Tex.App. -- El Paso 1993, no writ) (a counterclaim under the Declaratory Judgment Act may not seek resolution of a dispute already pending before the court); *Coastal States Crude Gathering Co. v. Natural Gas Odorizing, Inc.*, 899 S.W.2d 289, 291 (Tex.App. -- Houston [14th Dist.] 1995, writ denied) (recovery on a counterclaim brought under the Declaratory Judgment Act is proper only when the counterclaimant seeks affirmative relief that is more than a mere denial of the plaintiff's cause of action) . That is to say, a counterclaim for declaratory relief is proper when the counterclaimant could recover benefits, compensation, or relief even if the plaintiff were to abandon or fail to establish her cause of action; the counterclaim must seek a resolution of disputes not already pending before the Court.

60. In this case, DirecTV seeks to recover attorney's fees based upon a declaratory judgment counterclaim, cross-claim and third-party claim which merely states that Shields is not entitled to recover on the cause of action which he has stated against DirecTV. DirecTV. does not seek a resolution of any disputes not already pending before the Court. DirecTV. thus clearly fall within the general rule and, Shields previously argued, should not be allowed to maintain its counter-claim, cross-claim or third-party petition seeking a declaratory judgment and attorney's fees.

61. This Court ruled on Shields' special exceptions and rendered its Order on October 8, 2001, holding that

It is ORDERED that Plaintiff's special exceptions are SUSTAINED only to the extent that defendant DIRECT, INC.'s claims for declaratory judgment will be operative only if Plaintiff's case is dismissed without prejudice.

62. Shields has not dismissed his case against DirecTV and thus this Court's order sustaining Shields' special exceptions to DirecTV's attempt to obtain attorney's fees should remain sustained. DirecTV's motion for summary judgment on this ground should be denied.

TELEPHONE CALLS WERE MADE ON BEHALF OF OR FOR THE BENEFIT OF ECHOSTAR

63. EchoStar seeks summary judgment on the ground that no telephone calls were made in its behalf. However, the summary judgment evidence at the very least raises a question of fact on this issue.

64. As shown by the attachments to the affidavit of Joe Shields attached hereto, several of the telemarketing calls he received were made on behalf of the Dish Network. The summary judgment evidence shows that this is a trade or brand name of EchoStar.

65. In addition, as shown by the attachments to the affidavit of Shields, several of the telemarketers specifically admitted in their telephone calls that they were calling on behalf of EchoStar.

66. Summary judgment should thus be denied EchoStar on that ground.

THE TCPA APPLIES TO COMMON CARRIERS

67. Lastly, Echostar seeks summary judgment on the ground that it is a common carrier and that the TCPA does not apply to common carriers.

68. Statutes, FCC Regulations, FCC Orders, and cases hold that the entity on whose behalf or for whose benefit calls were made is liable for violations of the TCPA. There is no exemption made by statute or regulation for common carriers. 47 U.S.C. §206 ("In case any common carrier [such as EchoStar -- see 47 U.S.C. §153(10)]; in addition, in its motion for summary judgment, EchoStar admits that it is a common carrier. See EchoStar Satellite Corporation's Motion For Summary Judgment, page 43] shall do, or cause or permit to be done,

any act, matter, or thing in this chapter [the chapter to which Section 206 refers includes Section 227, the TCPA] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, ...”); 47 C.F.R. §64.1200(e)(2)(iii) (if a do-not-call request is recorded or maintained by a party other than the entity on whose behalf the solicitation is made, the entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request); 10 FCC Rec’d 12391, 12397 (1995) at paragraph 13 (“Our rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.”); 47 U.S.C. §217 (“In ... enforcing the provisions of this chapter, the act, omission, or failure of any ... other person acting for ... any common carrier or user, acting with the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.”); *In the Matter of Long Distance Direct, Inc.*, FCC 00-46 (FCC 2000) ([common] carriers are responsible for the conduct of third parties acting on the carrier’s behalf, including third party marketers. To hold that the statute does not include independent contractors would create a gaping loophole in the statutory requirements and frustrate legislative intent); *MCI Telecommunication Corp.*, 11 FCC Rec’d 1821 (1996) ([common] carriers are responsible for the conduct of third parties acting on the carrier’s behalf, including third party marketers); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rec’d 12391 ¶¶ 33-34 (August 7, 1995) (“We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA] ...”) (most interestingly, this is a citation used by EchoStar to support its claim that it has no liability to the plaintiff).

69. The authorities on which EchoStar relies are readily distinguishable. They cover a situation not found in the case at bar. The situation to which they refer is when a caller uses a telephone line or system of a common carrier, the common carrier is not liable. That is not the

situation present in the instant suit. Shields has not sued his telephone company or the telephone company providing service to any of the telemarketers. Rather, Shields has sued the entity (EchoStar) on whose behalf the calls were made.

70. In addition, as the authorities upon which EchoStar relies are distinguishable on another ground. The offers of the various telemarketers calling on behalf of one of the moving defendants are always the same as the offers made on the defendants' web-site. See Shields affidavit attached hereto. See, also, the contract between DirecTV and All American Alarms, Inc., a defendant herein, attached hereto. As noted above, EchoStar has not responded to the request for production of similar documents served upon it. (Shields recognizes that this is not a contract to which EchoStar is a party. It is assumed at this point that the contracts are very similar. As soon as such documents are provided by EchoStar, they will be provided to the Court by way of a supplemental response.) But this Court may readily believe and take judicial notice of the fact and EchoStar's "independent contractors" must have been compensated by EchoStar in some fashion or manner and that they did not engage in telemarketing on behalf of EchoStar out of some sort of philanthropy.

71. As EchoStar points out in its motion for summary judgment, a common carrier is liable under the TCPA if it is the "originator or controller of the content of the call or message." S. Rep. No. 178, 102d Cong., 1st Sess. 9 (1991) (cited by EchoStar in its Motion for Summary Judgment on pages 43 and 44). As also noted by EchoStar, a common carrier is liable for TCPA violations if it has a high degree of involvement. See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rec'd 8752 ¶54 (FCC October 16, 1992) (cited by EchoStar in its Motion for Summary Judgment on page 44).

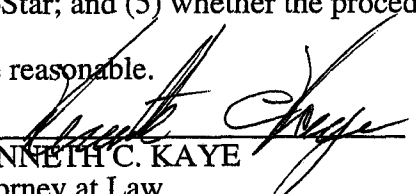
72. Although Shields believes that, as a matter of law EchoStar's arguments fail, at the very least they present fact questions -- was EchoStar the originator or controller of the message?; and did EchoStar have a high degree of involvement in the message being transmitted by the telemarketers themselves?

73. Lastly, this Court may fairly ask whether the telemarketing calls were made on behalf of or for the benefit of EchoStar. It is without question that the monies sent by the purchasing consumers are not sent to the individual telemarketers, nor do those telemarketers send a monthly bill to the consumers. All of the money that transfers hands is paid to EchoStar and some of that money, undoubtedly, is rebated or paid to the various telemarketers. At the very least, EchoStar has not met its summary judgment proof that the calls were not made on its behalf or for its benefit. See the contract between DirecTV and All American Alarms, Inc., a defendant herein, attached hereto.

CONCLUSION

74. The motions for summary judgment filed by DirecTV and EchoStar should be denied.

75. At a minimum, questions of fact have been raised by Shields and have not been rebutted by the defendants. Such questions of fact include (1) whether the telemarketers are independent contractors; (2) whether DirecTV or EchoStar are the originators or controllers of the messages recited by the telemarketers; (3) whether DirecTV or EchoStar have a high degree of involvement in the content of the messages sent; (4) whether the telemarketing calls were made on behalf of or for the benefit of DirecTV or EchoStar; and (5) whether the procedures adopted by DirecTV to prevent telemarketing calls were reasonable.



KENNETH C. KAYE
Attorney at Law
1101 West Main Street, Suite P
League City, Texas 77573
(281)332-3508
FAX NO. (281)332-4526
BAR NO. 11124000
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I do hereby certify that in compliance with the provisions of Rules 21 and 21a of the Texas Rules of Civil Procedure on this the 11th day of February, 2002, a true and correct copy of the above and foregoing Plaintiff's Response to the Motions for Summary judgment Filed by EchoStar Satellite Corporation and DirecTV, Inc. was mailed by certified United States Mail, return receipt requested, to the below listed persons, and that postage thereon was paid. Notice was further given that the original of this document was being filed with the Clerk of this Court.

Jeffrey D. Meyer
1001 McKinney, 18th Floor
Houston, Texas 77002

David L. Froneberger
Larry Wilson
444 W. Pasadena Blvd., Suite B
Deer Park, Texas 77536

Jahn Eric Humphreys
Humphreys & Humphreys
3814 NASA Road 1
Seabrook, Texas 77586

Juanita Barner
2512 Southmore, Suite A
Houston, Texas 77004

T. Wade Welch
Ross W. Wooten
2401 Fountainview, Suite 215
Houston, Texas 77057



KENNETH C. KAYE

AFFIDAVIT

STATE OF TEXAS

*

COUNTY OF GALVESTON

*

Before me, the undersigned authority, on this day personally appeared Joe Shields, known to me to be the person whose name is subscribed to the forgoing instrument, and having been by me duly sworn, upon his oath deposed and states as follows:

"My name is Joe Shields. I am over the age of eighteen (18) years and am in all respects competent to make this affidavit. I have never been convicted of a felony or a misdemeanor involving moral turpitude. All facts stated herein are based on my personal knowledge and are true and correct.

"Attached hereto are copies of some of the letters which I have sent to DirecTV and EchoStar and others complaining of DirecTV's and EchoStar's telemarketing calls to me; copies of correspondence which I have received from DirecTV and EchoStar concerning my request to be placed on their "do not call" lists; and copies of transcripts of some of the telemarketing calls which I have received and about which I have filed my complaint in this case. The telephone call transcripts of which are attached hereto all contained an artificial or pre-recorded voice.

"Sometimes, after receiving a telemarketing call, I have looked at the web site of the entity (DirecTV or EchoStar) on whose behalf the call was made or whose products or services were being advertised. I noted that the offers reflected on the web site were the same as the offer made in the telemarketing call.

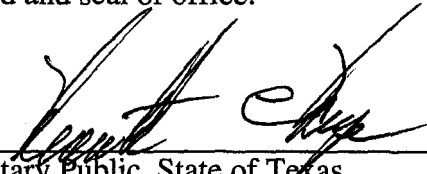
"Based on information I have seen on Dish Network's web site, I know that Dish Network is a brand name used by EchoStar."

Further affiant sayeth not.

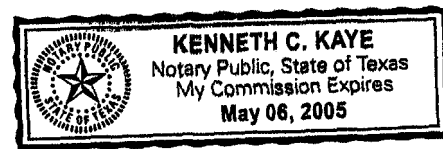


JOE SHIELDS

SWORN TO AND SUBSCRIBED BEFORE ME by the said Joe Shields, this the 10th
day of February, 2002, to certify which witness my hand and seal of office.



Notary Public, State of Texas



SOME LETTERS



Robert M. Hall
Senior Vice President, Business Affairs
and General Counsel

June 23, 1999

Mr. Joe Shields
16822 Stardale Lane
Friendswood, TX 77546

Dear Mr. Shields:

Your June 6, 1999 letter to Michael T. Smith has been referred to me. I have asked Ted Suzuki, Assistant General Counsel in DIRECTV's legal department, to look into the serious issues that you raise in your letter.

You state that the phone calls in question were initiated by an entity called Texas Telemarketing, Inc. We will be looking into these telemarketing activities and will take appropriate action if it is determined that federal and state laws governing such activities have been violated.

As you requested, we have flagged your DIRECTV account as a "do not call" account. This means that your name and telephone numbers will not be placed on any list for telephone or mail promotions initiated by or on behalf of DIRECTV. Our customer service representatives and entities that undertake telemarketing campaigns on behalf of DIRECTV have been trained not to call subscribers whose accounts are marked with a "do not call" flag.

Thank you for bringing this matter to our attention. Ted will be contacting you soon to inform you of the results of our investigation.

Very truly yours,

A handwritten signature in cursive script that reads "Robert M. Hall".

Robert M. Hall

RMH:dg

Cc: Ted Suzuki

Pat Wood, III
Chairman

Judy Walsh
Commissioner

Brett A. Perlman
Commissioner

W. Lane Lanford
Executive Director



Public Utility Commission of Texas

March 13, 2001

Dish Network (Echostar)
David K. Moskowitz
90 Inverness Circle East
Englewood, Colorado 80112

Dear Mr. Moskowitz:

The Office of Customer Protection has received a complaint against Dish Network regarding telephone solicitations. State and federal law require you to have systems and procedures in place to prevent repeated telephone solicitation calls to consumers who request no phone calls. I have enclosed a copy of the Substantive Rules of the Public Utility Commission (PUC) concerning telephone solicitation. Violations of PUC Substantive Rules may result in administrative penalties of up to \$5,000 per day per violation as outlined in Chapter 15 of the Public Utility Regulatory Act.

All telephone solicitors operating in the State of Texas are required to implement systems and procedures to ensure that consumers who ask not to be called are not called again. To avoid a penalty, the following name(s) and telephone number(s) must be effectively removed from all of your calling lists within 30 days of the date at the top of this letter:

Mr. Joe Shields
(281) 992-1165

For more information, you may want to obtain a copy of the latest Federal Trade Commission (FTC) rules concerning telemarketing which outlines additional requirements for telemarketers. The FTC telephone number is (214) 979-0213.

000575

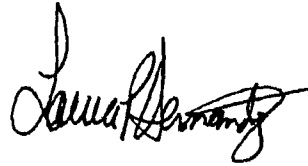


Printed on recycled paper

An Equal Opportunity Employer

If you have any questions or need additional information, please contact the Office of Customer Protection, toll-free, at 1-888-782-8477, and a staff member will be happy to assist you.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Hernandez", with a stylized flourish at the end.

Laura Hernandez
Enforcement Investigator
Office of Customer Protection

cc: Mr. Joe Shields

000576

Joe Shields
16822 Stardale Lane
Friendswood, Texas 77546
Home: 281-482-7603 (*Unpublished & Unlisted*)
Home and Fax: 281-992-1185
Work: 281-853-3466
Pager: 713-698-9808 (*24/7 response*)
Fax Work: 281-853-3104

May 2, 2000

Registered: Z142626634

Dish LTD
Attn: David K. Moskowitz
90 Inverness Circle East
Englewood, Colorado 80112

COPY

Mr. Moskowitz:

I am writing in reference to a complaint I have against your agents/distributors/vendors for what I believe are violations of state and federal law by initiating prerecorded telephone solicitations to my residential telephone line. The applicable federal law is 47 U.S.C. § 227 (1992) as amended and the FCC's implementing rules commonly known as the Telephone Consumer Protection Act (TCPA) of 1991¹. The applicable state law is Texas Business & Commerce Code, Section 35.47².

In my opinion the prerecorded telephone solicitations constituted multiple, separate and distinct violations of federal law. The calls were prerecorded telephone solicitations initiated to a residential telephone line, which were intended to induce the purchase of the services of Dish LTD and were initiated without prior express permission, invitation, or prior business relationship. The prerecorded telephone solicitations did not include the required identification of the caller and they did not include the required disclosure of the name of the business represented or the telephone number or address of the business represented.

Consequently, this is a demand that Dish LTD place both of my telephone numbers (281-482-7603 and 281-992-1165) on a company wide do not call list. This demand is for all call centers under direct control of Dish LTD, all contracted call centers, all affiliates and third party affiliates, and all authorized/independent agents/distributors/vendors of Dish LTD products and services. Furthermore, I demand a copy of the Dish LTD policy on maintaining a do not call list as required by the TCPA.

Enclosed are copies of my demand letter for damages to your Houston based agents/distributors/vendors.

I look forward to your timely attention to this matter.

Respectfully,

Joe Shields
Systems Engineering Specialist

CC: Kenneth C. Kaye
Counselor of Law
1101 West Main, Suite P
League City, Texas 77573

¹ 47 USC § 227 (b) (1) (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

² Section 35.47, Business & Commerce Code (g) A person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by this subsection, or both.

000605